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No. 99-1449

IN THE
Supreme Court of the United States

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Petitioners,
v.
MASSACHUSETTS ALCOHOLIC BEVERAGE CONTROL COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICI CURIAE* BEER DISTRIBUTORS OF MASSACHUSETTS, INC., WINE & SPIRITS WHOLESALERS OF MASSACHUSETTS AND MASSACHUSETTS PACKAGE STORES ASSOCIATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 30, 2000

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Beer Distributors of Massachusetts, Inc., the Wine & Spirits Wholesalers of Massachusetts and the Massachusetts Package Stores Association, Inc. ("Amici") hereby move, pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, for leave to file the attached Amicus brief in opposition to the petition for certiorari. The grounds for this request are as follows:

1. Petitioners in this matter have consented to the filing of the Amicus brief. Their consent is filed with the Clerk of Court.

2. Respondents have not objected to the filing of this Amicus brief, but have declined to sign a letter of consent thereto.

3. Petitioners do not address the 21st Amendment in their Petition and Respondents have only noted but not argued the Amendment's application in their argument below, even though it is dispositive.

4. The Amicus brief presents the argument that the 21st Amendment bars Petitioners' Complaint because the three-store limit on ownership of retail liquor stores, which is the basis for this controversy, is within the "core powers" of the Amendment. The statutory provision, therefore, is immunized from challenge under the Supremacy Clause whether or not it conflicts with the Sherman Act.

WHEREFORE, Amici respectfully request that this motion for leave to file their Amicus brief be granted.

Respectfully submitted,

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March 30, 2000

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INTEREST OF AMICI CURIAE

The Amici herein are three trade associations: the Beer Distributors of Massachusetts, Inc. ("BDM"); the Wine & Spirits Wholesalers of Massachusetts ("WSWM"); and the Massachusetts Package Stores Association, Inc. ("MassPack").* Together they represent 26 wholesalers and approximately 600 retailers in the Commonwealth of Massachusetts who are engaged in the distribution and

* Pursuant to Supreme Court Rule 37.6, Amici state that no counsel for a party authored this brief in whole or in part, and no persons other than the Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

sale of alcoholic beverages. Their operations are closely regulated by the Defendants herein.

The issue in this case as presented by Petitioners, whether the three-store retail ownership limitation in the Massachusetts Alcoholic Beverage Control Act, Mass. Gen. L. c. 138, § 15, is preempted by the Sherman Act, 15 U.S.C. § 1, could fundamentally alter how alcoholic beverage wholesalers and retailers of Massachusetts conduct their business. The motion of BDM, WSWM and MassPack to participate as Intervenor-Defendants in this matter was denied by the courts below, but they participated by submission of an Amicus brief with the parties' consent. The Amici believe that they can provide a different perspective for the Court's benefit because, while briefed below, neither party presents an argument herein on whether the 21st Amendment to the U.S. Constitution immunizes § 15 of the MABC from antitrust challenge.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2 of the 21st Amendment provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This Court has ruled repeatedly, and without exception, that the "core power" conferred on the States by § 2 is the power to control the distribution and sale of imported alcoholic beverages.

The Massachusetts Alcoholic Beverage Control Act ("MABC Act") provision at issue, limiting to three the number of retail outlets that a single person or entity may own, Mass. Gen. L. c. 138, § 15, is a clear example of a State liquor law that falls within the purview of the 21st Amendment. Section 15's multiple ownership restriction serves several vital State interests directly related to the distribution of alcoholic beverages in Massachusetts, such as ensuring orderly market conditions, "controlling the

tendency toward concentration of power in the liquor industry," and "preserving the right of small, independent liquor dealers to do business." *Johnson v. Martignetti*, 374 Mass. 784, 792, 375 N.E.2d 290, 297 (1978) (upholding § 15 against challenges under the Due Process and Equal Protection Clauses).

Both the District Court and First Circuit below ruled that the three-store limit in § 15 of the MABC Act was "unilaterally imposed by government . . . to the exclusion of private control" and thus that § 15 was neither within the coverage of the Sherman Act nor subject to preemption under the Supremacy Clause. *Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Commission*, 197 F.3d 560, 566 (1st Cir. 1999) (quoting *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986)), *affirming*, 184 F.R.D. 217 (D. Mass. 1999). We agree that such a conclusion is mandated by this Court's precedents and we support Massachusetts' argument that the case does not warrant the grant of a writ of certiorari.

However, we separately argue herein, as we did below,[1] that the Court should reject the Petition for the additional

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[1] Both the District Court and First Circuit declined to address the 21st Amendment argument preserved by the State-Defendant and presented fully by the Amici. In its denial of party participation to the Amici as Intervenor-Defendants, the District Court ruled that the 21st Amendment (and state action immunity) arguments "appear more appropriate for consideration after some factfinding, if that is necessary." Pet. App. 26a n.7. The First Circuit also did not address the 21st Amendment argument but stated only that intervention was unnecessary because the Intervenors' "*other* legal arguments (for example, based on the Twenty-First Amendment) to sustain the statute. . . . were easily presented in amicus briefs." Pet. App. 12a (emphasis in original).

In accordance with the First Circuit's lead, the Amici file this brief on the 21st Amendment issue to ensure that the Court is fully apprised of the argument that the three-store ownership limit in § 15 of the MABC Act also is immune from challenge under the Supremacy Clause because it is within the State's core powers as

reason that § 15's three-store restriction is immune from challenge because of the 21st Amendment's reservation to the States of "virtually complete control over . . . how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Section 15 of the MABC Act is a basic structural requirement setting forth one of several criteria that must be satisfied for the issuance of a retail license. Accordingly, § 15 comes within the protective umbrella of the 21st Amendment and, in this circumstance, overrides any preemption by the Sherman Act under the Supremacy Clause Thus, this is not an appropriate case for the Court once again to consider the boundaries between state regulation and the Sherman Act.[2]

ARGUMENT

The history of the 21st Amendment demonstrates that the purpose of § 2 thereof was to empower the States

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defined in the Amendment. That the lower courts did not address the 21st Amendment does not prevent its consideration by this Court because it is not a fact-based issue (and the District Court identified no relevant factual questions) and its consideration now can fully resolve the case and avoid the necessity for a remand. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 n.12 & 279 n.3 (1984) (majority and dissent agreed that 21st Amendment issue was properly before the Court although it was not argued below).

[2] Between 1982 and 1992, the Court addressed the metes and bounds of the state action immunity from federal preemption under the antitrust laws in ten cases. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991); *Patrick v. Burget*, 486 U.S. 94 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260 (1986); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

not only to control the importation of alcoholic beverages, but also to regulate all aspects of their distribution and sale where importation was allowed. Distribution and sale in this context include ownership qualification requirements and, more specifically, the number of retail stores that one person or entity may control. Because the statute in question is one way by which the State controls the marketing of alcoholic beverages, it "fall[s] within the core of the State's power under the Twenty-first Amendment," *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (Stevens, J., plurality opinion), and therefore cannot be preempted by the Sherman Act.

I. THE HISTORY OF THE 21ST AMENDMENT CLEARLY SHOWS THAT A PRINCIPAL PURPOSE WAS TO ALLOW STATES "ABSOLUTE CONTROL" OVER THE DISTRIBUTION AND RETAIL SALE OF ALCOHOLIC BEVERAGES

The first purpose of the 21st Amendment was, of course, to end Prohibition.[3] If that were all, however, § 1's "repeal" of the 19th Amendment would have been sufficient.

Section 2 was an acknowledgment that the "noble experiment" had failed because the effort to establish one uniform standard through national regulation did not take account of "local sentiment and local habits." 76 Cong. Rec. 4146 (1933) (statement of Senator Wagner). Accordingly, when the House version of the Amendment contained no express statement of State authority to regu-

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[3] Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Constitution, XXI Amendment.

late the importation and distribution of alcohol, *see* H.R.J. Res. 480, Senator Blaine, the chairman of the Judiciary Committee and primary sponsor of the Amendment, proposed the addition of § 2 "to restore to the States by constitutional amendment *absolute control* in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec. 4143 (1933) (emphasis added). As a consequence, the Senate approved the addition of § 2 because, as revised, the 21st Amendment would leave it "entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported." *Id.* at 4225 (statement of Sen. Swanson; concurrence of Sen. Robinson). *See generally 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 353-57 (1987) (O'Connor, J., dissenting).

This conclusion is confirmed by the Senate's consideration and rejection of a proposed § 3 that would have granted Congress "concurrent power" to regulate or prohibit sales of alcoholic beverages in on-premises establishments (i.e., restaurants and bars). *See* S. Rep. No. 1022, at 1 (1933). It was rejected by the Senate because the grant of such authority to Congress to regulate distribution would be contrary to the objectives of § 2. 76 Cong. Rec. 4143 (1933) (Senator Blaine); *see id.* at 4177-78 (Senator Black). State ratifying conventions similarly understood that the grant of full authority to the States to regulate who, how, where and when alcoholic beverages are to be distributed and sold within their boundaries was a central purpose of the 21st Amendment. *Ratification of the Twenty-first Amendment to the Constitution of the United States* 172 (E. S. Brown ed. 1938).

II. STATES HAVE "PLENARY POWER" TO REGULATE THE DISTRIBUTION AND SALE OF ALCOHOLIC BEVERAGES

The judicial construction of the scope and effect of the 21st Amendment has often been said to have changed substantially since 1933. It was initially interpreted as exempting all state regulation from challenge under the Commerce Clause. Later cases, however, rejected its application to state laws affecting constitutionally protected individual rights or federal laws not related to the "core powers" identified in § 2 of the Amendment. These cases are not inconsistent; they simply cover different subjects. This Court always has and continues to read the "core powers" of § 2 as granting States "plenary power to regulate and control . . . the distribution, use, or consumption of intoxicants within [its] territory." *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-15 (1996) (state regulatory power over distribution "largerly unfettered by the Commerce Clause") (citation omitted). Thus, under the 21st Amendment, the Court has given state controls on the structure of the distribution system a strong "presumption of validity." *North Dakota*, 495 U.S. at 433.

Nor are these merely isolated examples. Cases holding that the 21st Amendment does not apply to price fixing, discriminatory classifications, etc., have invariably taken special note of the core power immunity. For example in *Craig v. Boren*, 429 U.S. 190, 205-07 (1976), *reh'g denied*, 429 U.S. 1124 (1977), after reviewing the history of State regulation and of the adoption of the 21st Amendment, the Court observed that State controls focused specifically on importation, transportation and distribution are immune because it is "transparently clear" that they are within the core powers protected by

§ 2 of the Amendment. *Id.* at 207. *See also id.* at 215 (Stewart, J., concurring) ("Every State has broad power under the Twenty-first Amendment to control the dispensation of alcoholic beverages within its borders."). Other illustrative cases include: *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 584 (1986) (21st "Amendment gives the States wide latitude to regulate the importation and distribution of liquor within the territories"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 282 (1984) (Stevens, J., dissenting) (decisions have "consistently reaffirmed" and "repeatedly acknowledg[ed] the broad nature of state authority to regulate commerce in intoxicating liquors"); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966)[4] ("wide latitude" given to State liquor regulation); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 337 (1964) (Black, J., dissenting) (States given "plenary powers").

Of course, State liquor control laws imposing requirements outside the core areas of importation, transportation and distribution can be preempted by contrary federal law. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. supra.* But, "[n]othing in *Bacchus* or the other later cases overrules the principles iterated in the *Boren* and *Beam* cases" that liquor regulation within the "core powers" granted to the States continues to be immune under the 21st Amendment. *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). *Accord 44 Liquormart*, 517 U.S. at 514-15 (quoted p. 7, *supra*).

To be sure, where the challenged State laws have involved authorization of private conduct directly setting

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[4] The price affirmation law upheld in *Seagram*, not in issue here, was abrogated in *Healy v. Beer Institute*, 491 U.S. 324 (1989).

wholesale or retail *prices* of such products by private parties, the Court has found that the State liquor laws preempted by the Sherman Act were not immunized by the 21st Amendment. The control of price competition, at least by private parties, was not the kind of State control envisaged by § 2 of the 21st Amendment because it does not relate to "the structure of the distribution system." *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, supra at 110 (State authorized *resale price maintenance* preempted by Sherman Act); *see also Healy v. Beer Institute*, 491 U.S. 324 (1989) (*price* affirmation law requiring that in-state prices charged by brewers not exceed lowest price for beer products in border States); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (posting law delegating *price* setting authority to private parties); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986) (requiring distillers not to sell to wholesalers at a *price* no higher than the lowest price they charged anywhere in the U.S.).

However, where the primary interests of § 2 of the 21st Amendment are being served by the State regulation and price is not controlled by private agreement, the 21st Amendment trumps any application of the Supremacy Clause to overturn State law. None of the Supremacy cases identified above involved an ownership or locational restriction. None involved typical qualification requirements regulating who could own a retail establishment (e.g., non-felons with experience and adequate assets) or the number of retail outlets permitted in any community (e.g., quota and locational limitations).

North Dakota v. United States, 495 U.S. 423 (1990) is illustrative of the latitude given to State laws which regulate the distribution of alcoholic beverages. There, the Court unanimously upheld a "reporting requirement" under which out-of-state liquor distributors had to report

the volume of all liquor shipped to federal enclaves including military bases. A second regulation imposing a "labeling requirement" under which out-of-state distributors had to label liquor bottles shipped to a federal enclave so as to identify that the liquor was for consumption only within the federal enclave was upheld more narrowly on a 5-4 vote. Although there was no majority opinion on the labeling issue, both the 4-member plurality by Justice Stevens and the concurrence by Justice Scalia reaffirmed that regulation of the distribution system was within the State's core powers protected by the 21st Amendment as follows:

> [I]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate. (Stevens, J., plurality opinion) (495 U.S. at 432)
>
> The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." (Scalia, J., concurring) (495 U.S. at 447)

Under these principles, § 15 of the MABC Act fits within this 21st Amendment framework. It limits the number, and therefore the power, of retailers; past experience shows that such power often has been abused. *Cf. Actmedia, Inc. v. Stroh,* 830 F.2d 957, 966 (9th Cir. 1986) (three-tier ownership restrictions designed to control "dominance or undue influence").

III. MASSACHUSETTS' THREE-STORE OWNERSHIP LIMITATION FURTHERS CORE CONCERNS OF THE 21ST AMENDMENT AND THUS SURVIVES A SUPREMACY CLAUSE CHALLENGE

The three-store ownership limit in § 15 of the MABC Act is but one of a series of requirements by which Massachusetts closely regulates who may be licensed as a retailer (or wholesaler) of alcoholic beverages (§§ 12, 15 & 18), the personal background of those with ownership interests (§§ 12 & 15), the interests of manufacturers and wholesalers in retail stores (§ 25), the number of on- and off-premises outlets permitted in the State (§§ 15 & 17), the location of on-premise outlets as approved by local committees (§§ 12, 16C & 16D), the hours and days of operation of retail sales (§§ 12, 15, 33, 33A & 33B), the adulteration of alcoholic beverages sold at retail (§ 16), the collection of sales (or excise) taxes (§ 21), the reporting to the MABCC of all purchase orders and sales invoices by wholesalers (§ 18), the acceptance of unannounced inspections of wholesaler records and premises (§ 12A, 18, 19, 19B & 19C), and so forth. *See* Mass. Gen. L. c. 138, §§ 2 *et seq.*

Theoretical arguments can, of course, be asserted that each of these provisions, examined in isolation and out of context, could have deleterious effects on competition and thus be within the reach of the Sherman Act (assuming that other elements of an antitrust offense are shown). The requirement, for example, that retail establishments, including bars and restaurants, must restrict sales to prescribed hours or lose their licenses (MABC Act §§ 12 & 15), can be said to be a limitation on output. *Cf. In the Matter of Detroit Auto Dealers Ass'n, Inc.*, 111 F.T.C. 417 (1989), *aff'd*, 955 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992) (joint advertising agreement by auto dealers to close their showrooms at 6 p.m. held to be an agreement to shorten business hours and, thus,

an output reduction). The same can be said for the requirements that retail licensees must be of good character and without a felony record, and that they must not sell liquor to minors. MABC Act §§ 12, 15, 34 & 64. Those restrictions limit the number of potential sellers and buyers, thereby suppressing both supply and demand. Indeed, other provisions in the MABC Act, not challenged by Petitioners herein, set express quotas on the number of off-premise outlets (e.g., no more than 250 in Boston) as well as the number and location of retail stores in their locales (§ 17). *See also Victoria, Inc. v. ABCC*, 33 Mass. App. Ct. 507, 512, 602 N.E.2d 578, 581 (1992) (Commission to look at local public interest in addition to population in granting licenses).

In fact, however, the purpose and effect of these restrictions is to protect public health and safety, to prevent unauthorized trafficking (and diversion), to foreclose underage consumption, and to collect excise and sales taxes. *See, e.g.* MABC Act § 23 ("[t]he provisions for the issue of licenses and permits hereunder . . . are enacted with a view only to serve the public need and in such a manner as to protect the common good"); *Connolly v. ABCC*, 334 Mass. 613, 618-19, 138 N.E.2d 131, 135-36 (1956) (ABCC could consider patronage by school children, proximity to churches and propriety in evaluating license application). According to Massachusetts' highest court in *Johnson v. Martignetti, supra*, the ownership limitation in § 15 serves multiple public interest objectives, none of which involves price setting or output restriction:

> Concentration of retailing in the hands of an economically powerful few has been thought to intensify the dangers of liquor sales stimulations, thereby threatening trade stability and promotion of temperance. Regulation of the number of licenses issued,

> therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business. (374 Mass. at 792, 375 N.E.2d at 297)

Limiting the number of retail outlets controlled by one person ensures more effective enforcement of the State's liquor control program. The retail owner is more likely to directly oversee operations where three stores are the maximum, and the threat of a license revocation or suspension is likely to present a more serious sanction to the small business as compared to the chain store or supermarket. Similarly, control of market concentration and retail store ownership interests can be critical in preventing the misuse of economic power and in obtaining the benefits of competition. It is, for example, not unusual for public policy to impose limits on the number of regulated entities one person may control. *See* 47 C.F.R. § 73.3555 (Federal Communications Commission national multiple ownership rules for television stations); T. Krattenmaker & L. Powe, *Regulating Broadcast Programming* 94-96 (1994). *See also* U.S. Dept. of Justice & Federal Trade Commission, *Joint Horizontal Merger Guidelines* § 2.0 (1992).[5]

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[5] This Court also has upheld simlar restrictions outside the field of liquor control against Sherman Act and Due Process challenges. *E.g., New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (location of new automobile dealerships); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (ownership interest in retail service stations), *reh'g denied sub nom. Shell Oil Co. v. Governor of Maryland*, 439 U.S. 884 (1978); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) (ownership interest in pharmacies). *See also Boston Neighborhood Taxi Ass'n v. Dept. of Public Utilities*, 410 Mass. 686, 575 N.E.2d 52 (1991) (limit on number of taxi licenses).

Thus, when faced with a challenge to state regulation of the number and location of retail liquor stores, the lower courts have upheld such restrictions under the 21st Amendment. In *Simms v. Farris*, 657 F. Supp. 119 (E.D. Ky. 1987), *aff'd per curiam*, 840 F.2d 18 (6th Cir. 1988), the court upheld a limitation of the number and location of retail liquor stores in rural areas under the 21st Amendment because, as the District Court reasoned, the restriction was designed "to facilitate the ease of policing" compliance with state liquor regulations. 657 F. Supp. at 124. On review, the Sixth Circuit was more direct, upholding this "attempt by Kentucky to regulate the sale and use of liquor within its borders" because the State's authority was being applied "to control the distribution and use of intoxicating beverages." 840 F.2d at 18. *Accord Prices Corner Liquors, Inc. v. Delaware Alcoholic Beverage Control Commission*, 705 A.2d 571, 576 (Del. S.Ct. 1998) (upholding more restrictive locational requirements for off-premises retail liquor stores in unincorporated areas).

Similarly, Massachusetts' limit on the number of retail liquor stores that one person may control is justified by its policy of control over all aspects of the distribution of alcoholic beverages. By restricting that number to no more than three stores, the State has imposed a direct limit on the market power exercised by any retail store.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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